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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

FLOYD BOLTON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Tenth Circuit
	)	Docket No. 93-6402
	)	
SCRIVNER, INC.,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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137 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Tenth Circuit err in its interpretation of the Americans With Disabilities Act, 42 U.S.C. §12101 - 12213, by ruling that Petitioner Floyd Bolton was not disabled as a matter of law under the Act?

2. Did the Court of Appeals for the Tenth Circuit err in its interpretation of 29 C.F.R. §1630.2(j)(3)(ii) in that the Court found that Bolton was not substantially limited in the major life activity of working by holding as a matter of law that he did not meet requirements set out in 29 C.F.R. §1630.2(j) (3) (ii), even though those factors are permissive rather than mandatory under the regulations?

3. Did the Court of Appeals for the Tenth Circuit err in affirming the district court's opinion which, through summary judgment, prevented Bolton from being able to offer proof to the factfinder that his dismissal was pretextual?

4. Should this Court's opinion in St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), be read in such a way that precludes summary judgment in employment discrimination cases where a plaintiff has satisfied his prima facie case of discrimination and where credibility issues are present?

RULE 14 STATEMENT

The parties to the proceedings below included the Petitioner, Floyd Bolton, and Scrivner, Inc., Respondent. Since Bolton's initial lawsuit was filed, Scrivner, Inc., was purchased by Fleming Companies, Inc., an Oklahoma corporation.

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SCRIVNER, INC.,	)	
	)	
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PETITION FOR WRIT OF CERTIORARI

Petitioner Floyd Bolton ("Bolton") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on September 21, 1994. This petition is brought pursuant to Supreme Court Rule 13.1.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994). The district court decision is reported as Bolton v. Scrivner, Inc., 836 F.Supp. 783 (W.D. Okla. 1993). The Tenth Circuit opinion is attached hereto as Appendix "A." The district court decision is attached hereto as Appendix "B."

STATEMENT OF JURISDICTION

This court's jurisdiction is proper pursuant to 28 U.S.C. §1254(1) in that review is based upon a ruling set out by the United States Court of Appeals for the Tenth Circuit. Jurisdiction is further proper pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 13.1, in that the decision of the Court of Appeals for the Tenth Circuit was rendered on September

21, 1994.

Bolton's original action was brought in the Western District of Oklahoma alleging violation of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 pursuant to that court's jurisdiction over questions of federal law, 28 U.S.C. §1331.

STATUTES INVOLVED

The controlling statutes in this case are the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634.

Also at issue is this Court's ruling in St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). The applicable portion of the

statutes and regulations in question are attached hereto in Appendix "C."

STATEMENT OF THE CASE

Floyd Bolton was one of several older and disabled employees of Scrivner, Inc., who were dismissed for their inability to physically meet the demands of the job of order selector. Scrivner, Inc., is a wholesale grocery distributor in Oklahoma City, Oklahoma. Bolton filed suit in the United States District Court for the Western District of Oklahoma alleging age and disability discrimination.[1]

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[1] After Bolton filed his suit, three other former employees of Scrivner filed suit in the United States District Court for the Western District of Oklahoma. They are Milton v. Scrivner, Case number CIV 93-1748-C; Massey v. Scrivner, Case number CIV 93-1963-C; and Hunter v. Scrivner, Case number CIV 94-353-R. Three different judges heard the cases. Judge Wayne Alley heard Bolton, Judge Robin Cauthron heard Milton and Massey, and Chief Judge David Russell heard Hunter. In all four cases, Scrivner moved for summary judgment. In three of the four

Scrivner moved for summary judgment, alleging, among other things, that Bolton was not disabled under the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, and that he failed to show that age was a determining factor in his termination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634.

Bolton responded with a showing that

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cases, the judge found in favor of Scrivner. Judge Cauthron's decisions in Milton and Massey relied heavily on Judge Alley's ruling in Bolton. Judge Russell denied Scrivner's motion for summary judgment in Hunter.

Milton (CCA #94-6242) and Massey (CCA #94-6313) are both on appeal in the Tenth Circuit. Hunter was "resolved" following the trial court's denial of summary judgment. The only differentiating factor between Bolton and the other cases, is the fact that Scrivner considered the time in which to perform the functions of a grocery selector as an essential function of the job subsequent to Bolton's termination. The production standards were the same in all respects except the time within which to select items.

he was substantially limited in a major life activity, that he had of a record of disability, and that he was perceived as disabled by his employer, pursuant to the ADA. He further alleged that the Scrivner job requirement standards, which he could not meet due to his disability, were simply a pretext for terminating him due to his age and/or disability. The trial court sustained Scrivner's motion.

In a published opinion, United States District Judge Wayne Alley ruled that Bolton was not disabled pursuant to the ADA, in that he failed to show that his impairment substantially limited the major life activity of working in the general sense which transcended the Bolton's specific job of order selector.

On the ADEA claim, the district court discussed an interpretation of **St. Mary's Honor Center v. Hicks**, ___ U.S. ___, 113

S.Ct. 2742, 125 L.Ed.2d 407 (1993) which had been set forth by a California appellate court in Moisi v. College of the Sequoias Community College District, 25 Cal. Reptr.2d 165, 1993 WL 409977 (Cal. Ct. App. Oct. 1993). Moisi interpreted Hicks in such a way that deemed summary judgment inappropriate in employment discrimination cases where a plaintiff has satisfied his prima facie case of discrimination. The Moisi court reasoned that under Hicks whether an employer's reasons for termination were pretextual would necessarily be a fact question, precluding summary judgment. The district court rejected this view.

The district court also refused to consider a "combination" of violations of federal law resulting in Bolton's termination. In other words, discrimination due to age and disability

being the reasons for his termination. The district court failed to view the employer's actions as a whole, but attempted to separate out "facts" to support each respective claim versus taking all of the facts together to support Bolton's claim that age and disability formed the basis for his termination. Bolton appealed the district court's ruling to the Tenth Circuit.

In affirming the district court, the Tenth Circuit, in an opinion written by Judge Tacha, also ruled that Bolton had failed to establish that he was limited in the major life activity of working, a requirement under the ADA. The appellate court ruled that while the evidence went to the nature and severity of Bolton's impairment, it failed to show that he was restricted from performing a class of

jobs[2], a factor which may be considered under the ADA. On the ADEA claim, the Tenth Circuit ruled that Bolton had failed to raise an issue of fact regarding pretext. The court did not address the applicability of the Hicks case regarding summary judgment.

Bolton now requests that this Court grant his writ of certiorari to address the Tenth Circuit's interpretation of the applicable provisions of the ADA, and to determine the applicability of the Hicks decision regarding the granting of summary judgment when the employee has met his prima facie case for discrimination.

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[2] This finding was made despite the evidence from Scrivner's own expert who testified that Bolton was not capable of performing any job when she examined him.

REASONS FOR GRANTING CERTIORARI

I. WHEN THE COURT OF APPEALS HELD, AS A MATTER OF LAW, THAT BOLTON WAS NOT A "DISABLED PERSON" WITHIN THE ADA BECAUSE HE FAILED TO SHOW THAT HIS IMPAIRMENT SUBSTANTIALLY LIMITED THE MAJOR LIFE ACTIVITY OF WORKING, IT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, I.E., THE MEANING OF A DISABLED PERSON UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA), 42 U.S.C. §§12101-12213, WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED, BY THIS COURT.

A. The Court of Appeals incorrectly determined as a matter of law that Bolton was not a "disabled person" within the ADA.

Petitioner Floyd Bolton, an order selector at Scrivner, Inc., suffered several on-the-job injuries which left him partially disabled. Scrivner had policy in which it used two different doctors to evaluate an employee who sustained an on-the-job injury. The doctor who examined the employee for purposes of the Workers' Compensation claim would find no disability in an effort to deny benefits

to the employee. Subsequent to the Workers' Compensation claim being disposed of, and before the employee could return to work after his most recent injury, Scrivner required that he submit to a medical examination. This policy was followed in Bolton's case.

The doctor who conducted the "return to work" examination for Scrivner, Dr. Fine, determined that Bolton was unable to work. Bolton contended that he could have worked had he been afforded a reasonable accommodation for his disabilities. Scrivner failed to offer any accommodation, and Bolton was not allowed to return to work. Bolton then filed this action in district court alleging that he was terminated in violation of the ADA and the ADEA.

The ADA prohibits covered entities from discriminating against a "qualified

individual with a disability," because of the disability in job application procedures, hiring, advancement or discharge, compensation, job training, or any other terms, conditions, and privileges of employment. 42 U.S.C. §12112 (a). The term "disability" means:

> 1) a physical or mental impairment that substantially limits one or more of that individual's major life activities;
>
> 2) having a record of such an impairment; or
>
> 3) being regarded as having such an impairment. 42 U.S.C. §12102.

As previously stated, both the district court and the Tenth Circuit determined that Bolton was not disabled under the ADA. Bolton maintains that this holding is clearly wrong because he provided evidence of "disability" under all three requirements in §12102.

Bolton alleged facts which, if proved, satisfy §12102(1). First, he provided evidence that he had a physical impairment to his feet which substantially limited his ability to work in jobs which required prolonged standing, walking or lifting. Pursuant to 29 C.F.R. §1630.2(h)[3], a physiological disorder or anatomical loss to the musculoskeletal system is considered a physical impairment. The disability to Bolton's feet clearly falls within this definition. Further, "working" is deemed to be a major life activity, pursuant to 29 C.F.R. §1630.2(i). Finally, the disability to Bolton's feet substantially limited his ability to perform his job as order selector, in that he could not perform

[3] The interpretive guidelines for the equal employment provisions of the ADA are found at 29 C.F.R. §1630 and its Appendix.

jobs which required prolonged standing, walking or lifting, which the job of order selector required. Clearly, Bolton's showing, if proved, would qualify him as "disabled" under the ADA.

In addition, Bolton alleged facts which showed a record of disability. After suffering the on-the-job injury to his feet, Bolton filed a Workers' Compensation Claim pursuant to the Oklahoma Workers' Compensation Act. The Workers' Compensation Court found Bolton to have a nine percent impairment to his right foot and a twenty-nine percent impairment to his left foot. In addition, the Oklahoma Employment Security Commission determined that Bolton had restrictions of standing or walking for long periods of time and for lifting

weight over his head.[4] A record of impairment is defined in the **Appendix to 29 C.F.R. §1630.2(k)** to be, including, but not limited to, education, employment, or medical records. Clearly, Bolton's record of disability with the Workers' Compensation Court and with the Oklahoma Employment Security Commission falls within this definition.

Further, his medical records also indicate that Bolton suffers from a disability. Scrivner's physician, Dr. Fine, stated that Bolton was not ready to return to any employment as he presented himself to her for examination. Further, Bolton's own physician, Dr. Ellis, concluded that he was could not return to

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[4] **An individual who, because of an impairment, can only walk for brief periods of time would be substantially limited in the major life activity of walking. Appendix to 29 C.F.R. §1630.2(j).**

any work where he had to stand for prolonged periods. Clearly, Bolton had a physical impairment which severely limited his working capabilities in a class of jobs. Even without a showing that he was perceived as having an impairment by his employers, Bolton certainly fits the criteria for a disabled person under the statute.

The Tenth Circuit and the district court substituted their own judgment for what a disabled person is, rather than allowing the jury to determine the issue. Bolton should not have to prove every aspect of his case on paper before it can be presented to the jury. The function of the jury is to apply the law to the facts. A reasonable jury, after having heard the testimony of Bolton's doctors regarding his impairment, and after being instructed by the court as to the definition of a

"disability" under the ADA, could certainly have determined that Bolton was "disabled" under the ADA.

By its ruling, the Tenth Circuit is forcing an ADA plaintiff to make an affirmative showing on all criteria of the statute at the summary judgment stage. However, it is clear that many of the provisions in the ADA and the Code of Federal Regulations, which set out guidelines for implementing and interpreting the statute, are alternative in nature and not cummulative. In other words, the plaintiff must only prove one of several alternative criteria to be brought under the umbrella of the statute, rather than having to meet all of the criteria. The section regarding the definition of "disability" contains the disjunctive "or" rather than the conjunctive "and". Yet, Bolton, who has

offered evidence on all all three of the criteria, is determined not to be disabled under the statute.

B. The Court of Appeals incorrectly interpreted the applicability of the six criteria set forth in 29 C.F.R. 1630.2(j). The first three criteria at 29 C.F.R. 1630.2 (j)(2) are mandatory. The second three at 29 C.F.R. 1630.2(j)(3)(ii), are permissive, and therefore, not required for a showing of a disability.

The Court of Appeals focused its decision, as did the district court, upon a determination that Bolton was not substantially limited in the major life activity of working. The Code of Federal Regulations sets forth the definition for "major life activity" as follows:

> Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. §1630.2(i).

Bolton claimed that he was severely

limited in the major life activity of working.

In deciding as a matter of law that Bolton was not limited in the major life activity of working, the Court of Appeals used the criteria set forth at 29 C.F.R. §1630.2 (j). That section defines the term "substantially limits." The regulation provides three criteria at 29 C.F.R. §1630.2 (j)(2) which **should** be considered when determining whether an individual is substantially limited in a major life activity:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent and long term impact, or the expected permanent or long term impact of or resulting from the impairment.[5]

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[5] The Tenth Circuit agreed that Bolton had satisfied these criteria, but then required, as a matter of law, that he

The next set of criteria are found at 29 C.F.R. §1630.2 (j)(3)(ii). Those **may** be considered when determining whether an individual is substantially limited in the major life activity of working.

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes.)

In its opinion, the Tenth Circuit found

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prove the second set of criteria at the summary judgment stage.

that Bolton was not disabled as a matter of law because he did not make a showing that he was restricted from performing a class of jobs, one of the permissive criteria of subpart (j)(3)(ii).

Initially, Bolton argues that he did make a showing that he was restricted under subpart (j)(3)(ii) in that he was told by physicians that he could not perform jobs which required prolonged standing, walking, or lifting. The Tenth Circuit (and the district court) determined that those requirements were specific to the job of order selector.[6] However, logic and human experience tell us that there are many classes of jobs

[6] The inferences regarding the evidence which should favor the nonmovant in the summary judgment stage, somehow were shifted to the movant in that the court ruled as a matter of law that an issue of fact was not present for a jury's consideration.

which require prolonged standing, walking, or lifting. Sales clerks and stock boys do prolonged standing, walking and lifting. So do waiters and waitresses. The job of order selector is not the only job requiring such acts on the part of the employee. Yet, both the district court and the Tenth Circuit held that Bolton did not demonstrate that his disabilities transcended the specific job of order selector. That conclusion is faulty, and, quite frankly, incorrect, especially in deciding a motion for summary judgment.

Even if Bolton failed to make a showing that his disability transcended the job of order selector, he was not required under the interpretive federal regulations to show that it did because the language upon which the court relied was permissive rather than mandatory.

It is well-settled that the intention

of the legislature as to the mandatory or directory nature of a statute is determined by the language used in the statute itself. 75 Am Jur.2d, Statutes §22. Further, words or phrases which are generally regarded as making a provision mandatory include "shall" and "must. Permissive terms, such as "may," or "authorizes," are generally regarded as directive or discretionary. 75 Am Jur.2d, Statutes §22.

The C.F.R. provisions relied upon by the Tenth Circuit clearly show a legislative intent to make the first three criteria mandatory by using the word "should." (See 29 C.F.R. §1630.2 (j)(2)). The three criteria listed under 29 C.F.R. §1630.2(j)(3)(ii), by using the word "may," clearly show an intent that those factors are directory or permissive, and not required. Yet, it is the latter three

criteria that the Court of Appeals used to affirm the district court's holding. By its own admission, the Tenth Circuit states that Bolton's evidence "goes to the nature and severity, duration, and impact of Bolton's impairment." Due to the mandatory nature of the language, that is all he was required to show to determine that he was substantially limited in a major life activity. However, as previously stated, the evidence does show that there was a class of jobs (or a broad range of jobs in various classes) which he was not able to perform due to his disability. The only evidence that was not put forth by Bolton was evidence regarding the geographical area to which he had access. (See 29 C.F.R. §1630.2(j)(3)(ii)(A)).

The Appendix to 29 C.F.R. §1630.2(j) makes it clear that the determination of

whether an individual is substantially limited in working must be made on a case-by-case basis. Clearly, a court could, and did[7], find that plaintiffs like Bolton are entitled to put their cases before the jury.

Petitioner Bolton cannot emphasize enough the long-reaching effect of the Court of Appeals ruling in his case. If the decision is allowed to stand, it will be extremely difficult for ADA plaintiffs to survive summary judgment. Perhaps that is what Congress intended when it enacted the Americans With Disabilities Act of 1990. Perhaps Congress was hoping that the Courts would so severely limit the ability of disabled employees to get their cases heard by the jury that it would nullify the adverse effects the Act had on

[7] The district court in Hunter denied Scrivner's motion for summary judgment.

the business community.

But, if Congress intended that result, then why enact the ADA at all? The Rehabilitation Act was already in place and was being enforced by the Courts.

The answer lies in the statement of purpose found at 42 U.S.C. §12101(b) which forcefully states that the ADA is to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." As a remedial statute designed to eliminate discrimination against the disabled in all facets of society, the ADA must be broadly construed to effectuate its purpose. Kinney v. Yerusalim, 812 F.Supp. 547 (E.D. Pa. 1993), aff'd 9 F.3rd 1067 (3rd Cir. 1993). Although a jury might not agree that Bolton was "disabled" within the ADA, he

certainly has presented sufficient facts which would allow him to present his case to the jury.

This Court must grant certiorari to correct a misinterpretation and injustice. The Bolton decision is already being touted by employers as severely restricting the effect of the ADA. It is Petitioner's understanding that certiorari has been denied in several of the ADA cases. Petitioner urges this Court to grant certiorari here because it presents an excellent opportunity for determining the parameters of the ADA.

II. WHEN THE COURT OF APPEALS HELD THAT BOLTON DID NOT RAISE A GENUINE ISSUE OF FACT REGARDING THE PRETEXTUAL NATURE OF HIS TERMINATION, IT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

A. Did the Court of Appeals for the Tenth Circuit err in affirming the district court's opinion which, through summary judgment, prevented Bolton from being able to offer proof to the factfinder that his dismissal was pretextual?

The second federal question presented in Bolton's case was an age discrimination claim under the ADEA. (See 29 U.S.C. §623, in Appendix "C.") Bolton alleged that his age, as well as his disability, was a factor in Scrivner's decision not to put him back to work. He recounted specific instances of discriminatory remarks made by management and other documentary evidence regarding Scrivner's intentional discrimination toward its older and disabled employees.

Scrivner put forth Bolton's physical condition as its non-discriminatory reason for its failure to put him back to work. Here, according to the applicable law, the burden then shifts back to Bolton to show

that the reasons given by Scrivner for Bolton's termination were pretextual, and that they actually hid discriminatory reasons for the firing. Bolton maintains that he should have been allowed to put on evidence regarding pretext. Instead, the court determined, as a matter of law, that since Bolton did not show a nexus between the firing and the discriminatory treatment, he could not survive summary judgment on that issue.

Bolton admits that no one in the Scrivner organization admitted in deposition that its policies toward Bolton were discriminatory. However, he maintains that he should have been allowed the opportunity to cross-examine the Scrivner agents, and through it, show the pretextual nature of the reasons for termination. Cross-examination and the presentation of circumstantial evidence

is, very nearly, the only avenue open to an employee to dispute an employer's non-discriminatory reasons for termination. An employer will rarely admit to discriminatory practices and almost every employee has some deficiency to which an employer can point as a basis for termination. Bolton presented circumstantial evidence of discriminatory intent on the part of Scrivner.[8] He should have been afforded the opportunity to discredit Scrivner's reason for his termination in open court. Contrary to the Court of Appeals' decision, a reasonable jury could find sufficient pretext in the facts of Bolton's termination.

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[8] Two of the circumstantial reasons cited by Bolton were that a supervisor, Goodpasture, called Bolton and "old fart," and that casual workers were hired to replace Bolton, which was an economic benefit to Scrivner.

B. The Court of Appeals decision conflicts with this Court's decision in St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), which suggests that summary judgment is not appropriate at this level of the controversy where a plaintiff has satisfied a prima facie case for discrimination.

The Tenth Circuit did not address the Hicks case in its opinion. However, it upheld the lower court decision which discussed the applicability of Hicks to Scrivner's motion for summary judgment.

Some background information regarding the burden of proof and burden of persuasion is necessary to illustrate the existing conflict. The traditional test in employment discrimination cases is that the plaintiff must first establish a prima facie case of discrimination which includes evidence that the plaintiff was in a protected class, that he/she was qualified for the job from which he/she

was discharged, that he/she was discharged despite sufficient qualifications to perform the duties of the job, and that the position remained open and was ultimately filled by someone not in the protected class. McDonnell Douglass Corp. v. Green, 411 U.S. 792 (1973).

Once the prima facie case is established, it creates a presumption that the employer unlawfully discriminated against the employee. St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993). Once the prima facie case is established, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the termination. This rebuts the prima facie case of the employee. The employee must then persuade the factfinder that the employer's stated reasons are pretextual. Id. at 2747-48.

In the present case, the district court determined that Bolton had satisfied a prima facie case for age discrimination. It further found that Scrivner pointed to Bolton's physical inability to do the work as its legitimate reason for Bolton's termination. The court then held that Bolton failed to show pretext because he could not show a nexus between the discrimination and his termination. The court then found, as a matter of law, that Bolton was not terminated due to his age or disability.

Bolton urges this court to look more fully into the language of the Hicks case and to its application in cases where a plaintiff has established a prima facie case for discrimination. Bolton points out that a determination as to the pretextual nature of Scrivner's reasons for termination cannot be made out unless

Bolton is given the opportunity to present such testimony to the jury.

The district court placed a great deal of credibility on the non-discriminatory reason given for Bolton's termination despite the fact that Bolton had ample evidence that Scrivner had been less than honest in the past regarding its dealing with its injured, disabled, and older employees.[9] Credibility issues may not be resolved at summary judgment, but are left to the trier of fact. Such is the interpretation of a California Appeals

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[9] Scrivner denied that it monitored its employees regarding their physical ability to perform their respective jobs, but evidence to that effect existed. Scrivner had a practice of using one doctor to testify in Workers' Compensation Court that Bolton was not disabled, and therefore, could return to work, and then another doctor to testify that he was unable to work due to his disability. These are examples of only two reasons why a jury might doubt the honesty of Scrivner's proffered reasons for Bolton's termination.

Court decision, Moisi v. College of the Sequioas Community College District, 25 Cal. Rptr. 2d 165 (1993), 1993 WL 409977 Cal. Ct. App. Oct. 14, 1993). In the Moisi case the court interpreted Hicks to preclude summary judgment at the stage of the proceedings where a plaintiff has established a prima facie case for discrimination, and a defendant had offered a legitimate non-discriminatory reason for the termination. The language in Hicks is as follows:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such a rejection "[n]o additional proof of

> discrimination is required... (Emphasis ours.) Id. at 2749.

Because the credibility of the defendant's reasons would necessarily be a fact question, the Moisi court determined that summary judgment would be inappropriate at this stage of the proceedings, stating:

> If appellant has established a prima facie case under McDonnell Douglas, she is entitled to challenge the credibility of respondent's proffered reasons for terminating her and for refusing to rehire her at trial. (emphasis ours.) Moisi at 172.

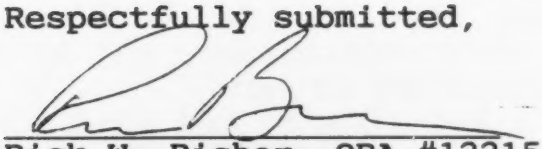
Admittedly, the district court in Bolton rejected the Moisi interpretation, stating that credibility is not as important when the employer has a long-established policy, as it did in Bolton's case. However, the court overlooks the fact that often long-established, pre-existing injury policies like the one Scrivner had can, and in this case do, violate federal law. Just because

Scrivner's policy existed for a length of time does not mean it was not discriminatory. Bolton should be allowed to present his evidence of the pretextual nature of Scrivner's policies to a jury and let them decide if the policy is discriminatory or not.

CONCLUSION

For the above-stated reasons, the Petitioner respectfully request the Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX "A"

FILED
United States Court of Appeals
Tenth Circuit
September 21, 1994

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FLOYD BOTON,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 93-6402
	)	
v.	)	
	)	
SCRIVNER, INC.,	)	
	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-93-364-A)

Submitted on the briefs:

Rick W. Bisher of Boettcher and Ryan, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

James C. Chandler, Peter T. Van Dyke, and Sam Reynolds Fulkerson of Lytle Soule & Curlee, Oklahoma City, Oklahoma, for Defendant-Appellee.

Before TACHA and EBEL, Circuit Judges, and ROGERS,* District Judge.

Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

TACHA, Circuit Judge.

Plaintiff Floyd Bolton appeals from the district court's grant of summary judgment to defendant, Scrivner, Inc. Bolton alleged that the was illegally discharged because of his disability and age, in violation of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. We exercise jurisdiction under

28 U.S.C. § 1291 and affirm.[1]

The district court's order sets forth the underlying facts. See Bolton v. Scrivner, Inc., 836 F. Supp. 783, 785-86 (W.D. Okla. 1993). Briefly restating the facts relevant to this appeal, Scrivner had employed Bolton as an order selector in its grocery warehouse for more than two years when Bolton suffered a work-related injury in October 1991. Bolton was given a medical leave of absence. According to Scrivner's policy, an employee on medical leave cannot return to work until the company doctor certifies that the employee is fit to resume work. Accordingly, when Bolton sought to return to work, Scrivner required him to be examined by a Scrivner-

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 24.1.9. The case is therefore ordered submitted without oral argument.

hired physician, Dr. Fine. Dr. Fine concluded that Bolton was unable to perform the job of order selector. When Scrivner refused to rehire Bolton as an order selector, Bolton filed suit, alleging that Scrivner had discriminated against him on the basis of his disability and age.[2]

The district court granted Scrivner's motion for summary judgment. The court held that the evidence did not show Bolton to be an "individual with a disability" under the ADA. Relying on Welsh v.City of Tulsa, 977 F.2d 1415 (10th Cir. 1992), a Rehabilitation Act Case under 29 U.S.C. § 794, the court ruled that evidence that Bolton's disability prevented him from performing his job was insufficient to show that Bolton was substantially limited in the major life activity of working. On

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[2] Bolton also alleged a number of state law causes of action.

the age claim, the court held that Bolton did not produce evidence sufficient to demonstrate that Scrivner's stated reason for preventing Bolton's return --his disability--was merely a pretext for age discrimination. The court held that allegedly discriminatory comments made by Bolton's supervisor did not show pretext because Bolton had not shown that the supervisor was involved in the employment decision at issue. Nor was pretext shown by the fact that Scrinver benefited financially when it replaced older or injured workers, the court concluded.

We review the district court's summary judgement ruling de novo, viewing the record in the light most favorable to the party opposing summary judgment. Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 527-28 (10th Cir. 1994). Summary judgement is appropriate "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We may affirm summary judgement "on grounds other than those relied on by the district court when the record contains an adequate and independent basis for that result." Cone, 14 F.2d at 528.

ADA Claim

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 122122(a). At issue in this case is whether Bolton is an

"individual with disability." "The term 'disability' means, with respect to an individual--(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairments." Id. § 12102(2). Although Bolton alleged in his complaint that Scrivner discriminated against him on this basis of a "perceived" impairment, and argued in opposition to summary judgement that he has a "record" of impairment, he limits his argument on appeal to whether he has a disability as that term is defined in subparagraph A of § 12102 (2).

The ada does not define the term "major life activities." We are guided by the definition found in regulation the Equal Employment Opportunity Commission (EEOC) has issued to implement title 1 of

the ADA, 29 C.F.R. Pt. 1630. See 42 U.S.C. § 12116 (requiring the EEOC to the issue regulation to implement Title 1 of ADA); cf. School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 (1987) (treating Rehabilitation Act regulations promulgated by the Department of Health and Human Services as "'an important source of guidance on the meaning of § 504 [of the Rehabilitation Act]'" (quoting Alexander v. Choate, 469 U.S. 287, 204 n.24 (1985)). the ADA regulations adopt the definition of "major life activities" found in the Rehabilitation Act regulation, 34 C.F.R. § 104. See 29 C.F.R. Pt. 1630, appendix to Part 1630--Interpretive Guidance on Title I of the Americans with Disabilities Act, § 1630.2(i) Major Life Activities. The term "means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R.

§1630.2(i).

Bolton argues that he is substantially limited in the major life activity of working. To demonstrate that an impairment "substantially limits" the major life activity of working, an individual must show "significant[] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." Id. § 1630.2(j)(3)(i)(emphasis added). The regulations specify that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." Id.

This court adopted a similar rule in Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992). In Welsh, we stated that "[w]hile the [Rehabilitation Act] regulations define a major life activity

to include working, this does not necessarily mean working at the job of one's choice." Id. at 1417. We held that "an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the [Rehabilitation] Act." Id. at 1419.

Bolton argues on appeal that the principle announced in Welsh should not apply because he brought his claim under the ADA, not the Rehabilitation Act. Alternatively, he argues that he produced evidence which could support the inference that he is significantly restricted in the activity of working, as defined in Welsh and the ADA regulations.

Bolton's first argument is easily rejected. "The ADA defines a disability in substantially the same terms as the [Rehabilitation] Act defines an individual with handicaps (now an individual with a

disability)." Chandler v. City of Dallas, 2 F.3d 1385, 1391 (5th Cir. 1993)(footnote omitted), cert.denied, 114 S. Ct. 1386 (1994). The legislative history of the ADA indicates that "Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA." 29 C.F.R. Pt. 1630, Appendix to Part 1630--Interpretive Guidance to Title I of the ADA, § 1630.2(g) (citing S. Rep. No. 116, 101st Cong., 1st Sess 21 (1989); H.R. Rep. No. 485 Part 2, 101st Cong., 2d Sess 27 (1990)). Further, as we just explained, the Welsh principle is consistent with the relevant ADA regulation, 29 C.F.R. § 1630.2(j)(i). The district court correctly ruled that Bolton's inability to return to his particular job without some accommodation does not demonstrate a substantial limitation in the major life activity of working. See Welsh, 977 F.2d

at 1417-19; 29 C.F.r. §1630.2(j)(3)(i).

Bolton's second argument is more troublesome. We review the record for evidence of six factors set forth in the ADA regulations. The first three factors "should be considered" when determining whether an impairment substantially limits a major life activity of working, id. § 1630.2(j)(3)(ii).

The three factors that "should be considered" when determining whether an impairment substantially limits a major life activity are :(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." Id.§1630.2(j)(2).

The tree additional factors that "may be considered" when an individual claims

substantial limitation in the major life activity of working are:

> (A) [t]he geographical area to which the individual has reasonable access;
> (B) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
> (C) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id. § 1630.2(j)(3)(ii); see also Welsh, 977 F.2d at 1419 (recognizing relevance of factors such as "'(1) the number and type of jobs from which the impaired individual is disqualified,(2) the geographical area to which the individual has reasonable access, and (3) the individual's job expectations and training.'" (quoting Jasany v. United States Postal Serv., 755

F.2d 1233, 1249 (6th Cir. 1985)(numbers added)). The district court entered summary judgement against Bolton because he failed to produce "evidence relevant to any of the factors, listed in Welsh, that should be used in evaluating whether an impairment substantially limits his employment potential." Bolton, 836 F. Supp. at 788.

Bolton claims that the district court overlooked for pieces of evidence which show that his impairment significantly restricts his ability to perform a class of jobs. Dr. Fine, who advised Scrivner in July 1992 that Bolton's pain, numbness, and limited ability to lift weight rendered him unfit to return to work, Appellant's App., Vol. II, at 386-87, stated in a deposition, "[B]y any stretch of the imagination, [Bolton] was not ready to return to any king of employment as he presented himself to me,: id. at 366.

Another doctor, Dr. Ellis, concluded in May 1992, that Bolton "cannot return to any work where he has to stand up on a concrete floor all day. [Bolton] will need vocational rehabilitation retraining into a position where he does not have to stand for prolonged periods." Id. at 396. The record also contains a notice from the Oklahoma Employment Opportunity Commission, awarding unemployment benefits based on medical evidence that Bolton could "perform work duties in keeping with [his] work experience, education and training with limitations with standing, walking and lifting overhead." Id. at 255. Finally, the record contains an opinion for the Oklahoma Workers' Compensation Court, finding that Bolton was temporarily totally disabled from October 23, 1994, to March 20, 1992, and he sustained a nine percent permanent partial disability to his right foot and a

twenty-nine percent permanent partial disability to his left foot. Id., Vol. I, at 197-98.

This evidence, however, does little to show that Bolton in restricted from performing a class of jobs. The evidence does not address Bolton's vocational training, the geographical area to which he has access, or the number and type of jobs demanding similar training from which Bolton would also be disqualified. Instead, the evidence goes to the nature and severity, duration, and impact of Bolton's impairment--the factors listed in 29 C.F.R. §1630.2(j)(2).[3] Because Bolton

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3 We note that this evidence is undermined by other evidence showing that Bolton's impairments were of limited duration and had no permanent or long term impact. The record shows that Bolton suffered work-related injures to both feet and his right shoulder in September and October 1991. Appellant's App., Vol. II, at 395. Bolton's job require him to stand on his feet much of the day, id., Vol. I, at 42, with some lifting, id., vol. II at 386. Bolton stated in his deposition that

failed to produce evidence showing a significant restriction in his "ability t perform either a class of jobs or a broad range of jobs in various classes," id. § 1630.2(j)(3)(i), we affirm the award of summary judgement to Scrivner on Bolton's ADA claim.[4]

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by May or June of 1992, he was capable of returning to his position at Scrivner. See id., Vol. I, at 61, 80. He testified that at the time of his deposition, he was no longer afflicted with any disabilities. Id. at 80. Applying for unemployment benefits in August 1992, Bolton submitted a signed statement that he was capable of performing any job that did not require lifting 50-70 pounds overhead. id. at 188. On a separate statement, certified by Bolton to be true, correct and complete, Bolton represented that he was capable of performing his usual type of work. Id. at 190.

For purposes of your review, we assume that Bolton's evidence demonstrates a relatively severe impairment, of long term duration, producing a permanent or long term impact.

[4] We express no opinion on whether Bolton qualifies as disabled under the ADA based on a perceived impairment or a record of impairment, as those issues are not raised on appeal.

ADEA Claim

ADEA claims are analyzed under the three-step framework outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). Cone, 14 F.3d at 529. We presume, as the district court presumed, that Bolton made out a prima facie case of age discrimination. Scrivner, in turn, produced evidence that its refusal to rehire Bolton was motivated by concerns over Bolton's physical limitations. Scrivner, thus, satisfied its burden of articulating a "facially nondiscriminatory reason for its employment decision--a reason "that is not on its face, prohibited by" the ADEA. Cf. EEOC v. Flasher co.,986 F.2d 1312, 1316 n.4 (10th Cir. 1992). At that point, the burden shifted to Bolton to present probative evidence which could support the inference that Scrivner's reason was merely a pretext for discrimination. See

Rea v. Martin Marietta Corp., No. 93-1101,1994 WL 271936, at *2 (10th Cir. June 20, 1994). "A plaintiff demonstrates pretext by showing either 'that a discriminatory reason more likely motivated the employer or ... that the employer's proffered explanation is unworth of credence.'" Id. (quoting Texas Dep't of community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

We agree with the district court that Bolton failed to raise a genuine issue of fact regarding pretext. The comments by Bolton's supervisor that Bolton was an "old fart: do not show pretext because Bolton failed to demonstrate a nexus between those comments and Scrivner's decision not to rehire him. See Cone, 14 F.3d at 531 (requiring nexus between comments and challenged employment decision) Further, that Scrivner may have saved money by replacing Bolton with

a casual worker does not show pretext. EEOC v. Sperry Corp., 852 F.2d 503,511 (10th Cir 1988). "Absent some evidence that such concerns mattered to Scrivner when it decided to institute its injured workers policy or when it decided to prevent Bolton form returning, a reasonable jury could not infer that cost savings alone indicate[s] an intent to discriminate on the basis of age." Bolton, 836 F. Supp. at 793 n.11 (citing Sperry Corp., 852 F.2d at 511-12).

The judgement of the United States District Court for the Western District of Oklahoma is AFFIRMED.

APPENDIX "B"

1B

FILED
November 9, 1993
Robert Dennis
Clerk, U.S. District Court
Western District of Oklahoma

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

FLOYD BOLTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. CIV-93-364-A**
	)	
SCRIVNER, INC.,	)	
	)	
Defendant.	)	

O R D E R

The matter before the Court is a Motion for Summary Judgment by defendant, Scrivner, Inc. ("Scrivner"), pursuant to Fed.R.Civ.P. 56(c). Since plaintiff, Floyd Bolton ("Bolton"), has filed a response to defendant's motion, the matter is now ripe for decision. Based upon a review of the supporting and opposing briefs, their appendices and the relevant case law, the Court grants defendant's motion.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff Bolton, a 50-year-old man, had been employed by defendant Scrivner in the position of "order selector" at defendant's grocery warehouse in Oklahoma City since February 1989. Plaintiff has had several work-related injuries, the most recent of which occurred on October 17 and October 19, 1991 when both plaintiff's feet were accidentally injured by a co-worker. Plaintiff has not worked at this job since then. Scrivner's policy prohibits injured workers from returning to their positions unless they are found to be 100 percent fit by the company's medical doctor. Workers who are unable to return to work because of physical injury are eligible for unpaid leave of up to 24 months. Since October 1991, Bolton's job has been done by causal workers. This practice is permitted while regular

workers are on leave under the collective bargaining agreement between Scrivner and the union representing Scrivner's workers, the Teamsters.

Bolton has been examined by sever medical doctors regarding his physical before and since the October 1991 accidents. A medical doctor paid by Scrivner, Dr. Yvonne Fine, treated Bolton for injuries to his back in September 1991 and found him able to return to his job. In anticipation of a hearing before the Oklahoma Workers' Compensation Court regarding the injuries to Bolton's feet, both plaintiff and defendant hired medical experts to evaluate plaintiff's physical condition. In his evaluation, Bolton's expert, Dr. John Ellis, stated that Bolton had a permanent partial disability, due to various ailments, which affected his ability to work. However, Scrivner's expert, Dr. C.B. Pettigrew, reported that,

despite the injuries, Bolton was not seriously disabled and should be able to return to his job. The court ultimately determined that Bolton was temporarily totally disabled and awarded him benefits from October 23, 1991 to March 20, 1992.

Bolton also applied for and received unemployment insurance benefits, effective August 9, 1992. In granting benefits, the Oklahoma Employment Security Commission referred to the evidence of Bolton's physical disabilities. The Commission stated that the reason for plaintiff's unemployment was his inability to pass Scrivner's physical. The Commission also noted that Bolton would be able to work with restrictions on the amount of standing and lifting he would be required to perform.

In July 1992, Bolton asked that he be allowed to return to his position. Scrivner then sent Bolton back to Dr.

Fine, who, after conducting a general evaluation, requested that Bolton be given a back evaluation. Based upon her evaluation and the back test, Dr. Fine believed that Bolton's multiple injuries rendered him physically unable to perform the required tasks as order selector. These tasks included lifting cartons that weighted over 70 pounds and standing for lengthy periods of time on concrete.

Bolton disagrees with Dr. Fine's conclusion that he should not be allowed to return to his job. However, he has not obtained another opinion from a medical specialist hired by the union, an option offered by the collective bargaining agreement. Nor has plaintiff provided Scrivner with an evaluation by his own doctor stating that he has fully recovered and is able to function as the job description requires. Bolton did consult with his union local about his treatment

by Scrivner, indicating his desire to return to work and his belief that Scrivner was unfairly preventing him from doing so because of Dr. Fine's recommendation. Both the union local and Bolton's counsel decided not to pursue plaintiff's disagreement through arbitration.

On January 13, 1993, plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that Scrivner denied him the right to return to his job due to his disability and age. Plaintiff subsequently received his right to sue letter from the EEOC on January 29, 1993. On March 2, 1993, plaintiff filed a complaint in this Court, alleging that his treatment by Scrivner and its policy of not allowing injured workers to return to their jobs violated both the Americans with Disabilities Act (ADA) and the Age Discrimination in

Employment Act (ADEA), as well as state public policy. Bolton also alleged several state law causes of action, including conspiracy to commit fraud and workers' compensation retaliatory discharge.

SUMMARY JUDGMENT

Summary judgment is appropriate if the pleadings, affidavits and depositions "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Any doubt as to the existence of a genuine issue of material fact must be resolved against the party seeking summary judgment. In addition, the inferences drawn from the facts presented must be construed in the light most favorable to the nonmoving party. Board of Education v. Pico, 457 U.S. 853, 863 (1982). Nonetheless, a party opposing a motion for summary judgment may not

simply allege that there are disputed issues of fact; rather the party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(c) (emphasis added). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted).

Bolton has alleged that Scrivner's policy and practice with respect to injured and disabled employees and his own treatment by Scrivner in this case violate both the Americans With Disabilities Act, 42 U.S.C. §12101, et seq., and the Age Discrimination In Employment Act of 1967, 29 U.S.C. §621, et seq. Scrivner asserts

that Bolton has not made out a prima facie case under either federal cause of action. Essentially the same set of facts are used by Bolton to prove both claims. This overlap of facts puts plaintiff in a dissonant posture, as will be discussed below; because for success on his first claim he must be disabled and on his second claim, he must be able. These facts, and Scrivner's challenges to Bolton's legal conclusions, are the basis for this Court's analysis with respect to each statute.[1]

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[1]Scrivner's first contention is that Bolton, in fact, is not terminated from his position, and consequently, all his causes of action should be dismissed. See Plaintiff's Brief at 5. Whether plaintiff is currently employed by Scrivner is clearly in dispute from the facts of this case and, therefore, must be resolved in favor of the plaintiff's position as the non-moving party for the purposes of this motion. Moreover, the undisputed facts indicate that Bolton has not worked at his job sine October 1991 nor has he received any compensation from Scrivner as an employee. Even if Bolton was considered to

A. Plaintiff's Claim Under the Americans With Disabilities Act (ADA)

The Americans With Disabilities Act (ADA) states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a) (West 1993 Supp.). Plaintiff claims that defendant engages in a policy of discriminating against disabled workers by preventing them from returning to their jobs after a period of disability. In

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be on uncompensated medical leave, as Scrivner argues, the net effect on him would be basically the same. Nevertheless, for the purpose of analyzing plaintiff's federal claims, the Court will assume arguendo that Bolton was discharged by Scrivner.

particular, plaintiff claims that defendant violates the ADA by refusing to provide a "reasonable accommodation" for his physical restrictions so that he may return to work. Scrivner argues that plaintiff should suffer a summary judgment because the ADA is inapplicable to Bolton. The Court agrees.[2]

---

[2] Scrivner initially argues that Bolton failed to state a claim because the alleged discriminatory event giving rise to his claim occurred prior to the effective date of the Act, July 26, 1992. See Defendant's Brief at 19. Defendant suggests that the only potential evidence of discrimination based upon disability offered by plaintiff is Dr. Fine's report from July 16, 1992 stating that plaintiff is unable to work. However, plaintiff's ADA claim is that the discrimination by Scrivner is an on-going practice. Scrivner cites case law which suggest that the failure to re-employ due to disability is evidence of neither continuing discrimination nor a continuing policy of discrimination for the purposes of the ADA. See Morrison v. Detroit-Macomb Hospital Corporation, 62 Empl. Prac. Dec. (CCH) ¶42,368 (E.D. Mich. 1993). However, on the facts as presented, when Scrivner actually violated the ADA, if at all, remains unclear. Was it when Bolton was injured in October 1991? Was it when

The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8) (West 1993 Supp.) In §12101, "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §12102(2) (West 1993 Supp.). This definition of disability is essentially the same as that in the Rehabilitation Act

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Scrivner refused to let Bolton return to work after his first request? After his second request? Because the facts regarding this issue are in dispute, the Court must give plaintiff the benefit of the doubt by assuming that the ADA applies to the time period of his claim.

of 1973, 29 U.S.C. §706(8)(B). See Chandler v. City of Dallas, 2 F.3d 1385, 1391 (5th Cir. 1993) ("The ADA defines a disability in substantially the same terms as the Act defines an individual with handicaps (now an individual with disability)."). In determining whether plaintiff is in fact disabled, the Court is guided by how this language has been construed under the Rehabilitation Act.

Defendant cites Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992), to support its contention that the plaintiff is not handicapped under the ADA. Welsh involved an applicant for the position of firefighter who was rejected because of sensory deficits in his hand. The fire department declined to hire the applicant because his physical limitations would preclude satisfactory performance of essential fire duties. Id. at 1416. In determining whether Welsh was disabled

under the Rehabilitation Act, the Tenth Circuit noted that there were two elements involved: first, impairment and, second, whether the impairment substantially limited one or more major life activities. Id. at 1417. Examining the second of the two factors, the court held that "an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the Act." Id. at 1419. The court suggested that several factors were relevant to the analysis of whether an impairment limited a person's employment potential. These included the number and type of jobs from which the individual was disqualified, the geographic area to which the individual had access and the individual's job training and expectations. Id. Because the plaintiff in Welsh would have had the burden of proving at trial that his impairment

substantially limited a major life activity, the Tenth Circuit noted that "he was obligated to come forward with 'specific facts showing that there is a genuine issue for trial' on this matter" in order to avoid summary judgment. Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). Thus, the Court of Appeals affirmed the district court's grant of summary judgment in favor of Tulsa.

Given the Tenth Circuit's interpretation of the Rehabilitation Act language in Welsh, it appears that Bolton's claim cannot survive summary judgment based upon the undisputed facts. Plaintiff has presented ample evidence that he is unable to work at the position without some accommodation. Indeed, the essence of his claim is that Scrivner should modify the working conditions in order to make it possible for plaintiff to

return to his former job. However, just as with the plaintiff in Welsh, the burden would be on Bolton to demonstrate that he is disabled in some more general sense transcending his specific job, that his limitations substantially impaired a major life activity in order to establish his prima facie case under the ADA. The record is bereft of any evidence which would support such a contention. Beyond the evidence regarding the specific position of selector, plaintiff offers no evidence relevant to any of the factors, listed in Welsh, that should be used in evaluating whether an impairment substantially limits his employment potential. While Bolton certainly cannot perform the particular job of selector without assistance (and indeed would be restricted from doing a number of physical jobs), such limitations do not answer the more important inquiry of how they

restrict Bolton's overall employment opportunities. To make a somewhat extended analogy, the mere fact that the average person on the street could not play fullback on the New York Giants without some assistance does not mean that he or she is handicapped as defined by the ADA. As noted in Welsh, "[a]ny other interpretation would render meaningless the requirement that the impairment substantially limit a major activity."[3] 977 F.2d at 1419.

Moreover, the restrictions that both Dr. Ellis and Dr. Fine noted regarding Bolton's physical condition (and, as

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[3] Bolton argues that working is obviously a major life activity under the ADA. However, this misses the point. As the court noted in Welsh, "While the regulations define a major life activity to include working, this does not necessarily mean working at a job of one's choice." 977 F.2d at 1417 (citing Tudyman v. United Airlines, 608 F.Supp. 739, 745 (C.D. Cal. 1984).

plaintiff concedes, impair him) include restrictions on tasks that Scrivner considers important to the performance of the job of selector. The determinations of both the Workers' Compensation Court and the Employment Security Commission only reinforce the conclusion that Bolton does not have the ability to perform the required tasks of this specific position. Bolton's physical limitations directly relate to his qualifications for the position of selector as Scrivner has defined it.[4]

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[4] Plaintiff also argues that Scrivner's policy of preventing employees with physical restrictions from returning to their positions violates the ADA. To start, the Court is presented with insufficient evidence regarding other employees who have been treated in a manner similar to Bolton. Moreover, the fact that Scrivner prevents injured employees from returning to their specific jobs does not violate the ADA per se. One could easily imagine circumstances similar to Bolton's in which an employee was not allowed to return to his or her particular position because of physical limitations.

Because bolton has failed to offer specific evidence to show that there is a genuine dispute of material fact regarding his eligibility under the ADA, an element for which Bolton would bear the burden of proof at trial, defendant's motion is granted with respect to this claim.

B. Plaintiff's Claim Under the Age Discrimination In Employment Act of 1967 (ADEA)

Plaintiff's claim involving the Age Discrimination In Employment Act of 1967 (ADEA), 29 U.S.C. §621, et seq., is essentially the same as his claim under

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The ADA does not require employers to modify the actual duties of a job in order to make an accommodation for individuals who are not physically capable of performing them. See 42 U.S.C. §2111(8) (West 1993 Supp.) ("For purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential . . ."). The statute still requires that an individual be able to "perform the essential functions of the employment position . . ." Id.

the ADA. Using the same facts, Bolton asserts that Scrivner's policy and his treatment demonstrate that Scrivner discriminates against older workers. As with the ADA claim, Scrivner argues that Bolton has not made out a prima facie case under the ADEA.

In a manner similar to the ADA with respect to disabled persons, ADEA prevents an employer from discriminating against an individual on the basis of age.[5] The

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[5] The Act states,

> It shall be unlawful for an employer -
>
> (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; . . .

required elements for a prima facie case under ADEA, as well as the relative burdens of production and persuasion, are well established. As the Supreme Court held in the context of Title VII in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), a plaintiff must show that he is within the protected age group, that he is doing satisfactory work, that he was discharged despite the adequacy of his work and that a younger person replaced him. See E.E.O.C. v. Sperry Corp., 852 F.2d 503 (10th Cir. 1988). Once the plaintiff meets his burden of production, the burden shifts to the defendant to demonstrate a legitimate, nondiscriminatory reason for its actions. If the employer does so, the burden then

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29 U.S.C. §623(a) (West 1985 & 1993 Supp.).

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

shifts back to the plaintiff to present evidence that the employer's purported justification is a pretext. See E.E.O.C. v. Flasher Co., Inc., 986 F.2d 1312 (10th Cir. 1992). After all evidence has been produced, the inquire becomes whether the plaintiff has presented sufficient evidence to permit a reasonable factfinder to find that age was a determinative factor in the employer's decision. See Sperry Corp., 852 F.2d at 507. The ultimate burden of proving that age was a determining factor remains with the plaintiff. See Lucas v. Dover Corp., Norris Div., 857 F.2d 1397, 1401 (10th Cir. 1988); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 (10th Cir. 1988). See also St. Mary's Honor Society v. Hicks, ____ U.S. ____, 113 S.Ct. 2742, 2747 (1993) ("[A]lthough the McDonnell-Douglas presumption shifts the burden of production to the defendant, [t]he

ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.") (citations and quotations omitted). "If the plaintiff establishes that the cited reasons for his termination were pretextual, the factfinder can infer that discrimination took place." Merrick v. Northern Natural Gas Co., 911 F.2d 426, 429 (10th Cir. 1990).

In examining Bolton's prima facie case, it is without question that Bolton is within the age group covered by ADEA. While defendant asserts that plaintiff was not discharged, the Court will assume that he was for the purposes of this motion, was discussed earlier. Defendant further contends that Bolton was not replaced by younger workers, but by casual workers. While these replacement workers may indeed be older or younger than Bolton, the Court

will assume that the fact that he was replaced by workers who are paid less and offered fewer benefits satisfied his prima facie burden. Finally, there is evidence that Bolton performed his job well enough to remain employed before he was injured. Therefore, the Court will conclude that Bolton's performance was sufficiently adequate to meet this last required element of the prima facie case.[6] See MacDonald v. eastern Wyoming Mental Health Center, 941 F.2d 1115, 1121 (10th Cir. 1991) ("[A] plaintiff may make out a prima facie case of discrimination in a discharge case by credible evidence that she continued to possess the objective qualifications she held when she was

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[6] There is some mention in deposition testimony that Bolton was slower than some of his coworkers at doing his job. However, there is no evidence that Bolton was so slow as to place his employment in jeopardy.

satisfactory, even when disputed by her employer, or by evidence that she held the position for a significant period of time.") (citations omitted).

Nevertheless, even if the Court assumes that Bolton has made out his entire prima facie case, the central query at the next stage of the court's analysis involves Scrivner's asserted justification that Bolton's disability prevents him from doing the job of selector. Bolton's position regarding his ADA claim must be kept in mind in the Court's analysis. As discussed earlier, plaintiff asserted that defendant was preventing him from working because of his disabilities. Indeed, Bolton's ADA claim hinged on his belief that he was entitled to an accommodation so that he may return to work. In so arguing, plaintiff acknowledged that his physical limitations played a significant role in Scrivner's decision making.

The essential question, therefore, is whether Bolton has sufficient evidence to persuade a jury that Scrivner's rationale (his disability) was merely a pretext for age discrimination. See Hicks, ____ U.S. at ____, 113 S.Ct. at 2749 ("The defendant's 'production' (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' . . .") (citation omitted); Flasher Co., 986 F.2d at 1321. Based upon the evidence before the Court, plaintiff cannot meet his burden. Three medical doctors have evaluated Bolton (Drs. Ellis, Fine, and Pettigrew), two of whom came to the conclusion that he had disabilities severe enough to prevent him from working at a job requiring long hours of standing and heavy lifting. One of the doctors was Dr.

Ellis, the very doctor plaintiff hired to help prove his claim before the Workers' Compensation Court. While admittedly there is a conflict between the conclusions of Drs. Ellis and Fine and the conclusion of Dr. Pettigrew, the question is not whether Scrivner should have believed one doctor over another. See Hicks, ____ U.S. ____, 113 S.Ct. at 2748 ("In the nature of things, the determination that a defendant has met its burden of production (and thus has rebutted any legal presumption of intentional discrimination) can involve no credibility assessment."). Rather, the burden shifts back to Bolton, as the plaintiff, to come forward with evidence that demonstrates that Scrivner's excuse was only a pretext for discrimination. See Flasher Co., 986 F.2d at 1316 ("Once the defendant has set forth a facially nondiscriminatory reason for termination,

the plaintiff then assumes the normal burden of any plaintiff to prove his or her case at trial.").

Some question has recently arisen regarding whether it is appropriate to grant summary judgment at this stage of a court's analysis. A California District court of appeal case, Moisi v. College of the Sequoias' Community College District, No. F017075, 1993 WL 409977 (Cal. Ct. App. Octo. 14, 1993), suggests that the U.S. Supreme Court's decision in Hicks precludes summary judgment at this stage because the production of evidence of a nondiscriminatory reason does not eliminate an inherent need to assess the credibility of the defendant's offering.[7]

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[7] The Court recognizes that Moisi is controlling authority in California only. Indeed, the California appellate court made explicitly clear that it was interpreting Hicks in light of California law and in a manner quite possibly at odds with the law of the federal circuit courts

Because "credibility issues may not be resolved at summary judgment but are left for the trier of fact," the California court reasoned that summary judgment will often be inappropriate in cases where a plaintiff has established a prima facie case. 1993 WL 409977, at *14. The basis for the Moisi decision comes from a passage in Hicks, which states, "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, sufficient to show intentional discrimination. Thus, rejection of the defendant's preferred reasons, will permit the trier of fact to infer the ultimate fact of intentional

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of appeal. See 1993 WL 409977, at *13-15. Nevertheless, the Court takes this opportunity to address Moisi as its reasoning could be used to justify a change in the law unsupported by the governing jurisprudence of this circuit.

discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required." Hicks, ____ U.S. at ____, 113 S.Ct. at 2749 (emphasis in original) (citations and footnote omitted). However, the California court misreads Hicks in light of well-established law regarding both employment discrimination and summary judgment procedures.

The language in Hicks cited by the Moisi court states only that a factfinder's refusal to believe a defendant's proffer, combined with a prima facie case, is sufficient to draw an inference of discrimination. The plaintiff need not provide additional evidence in order for the factfinder's

judgment to be valid.[8] However, Hicks consistently reaffirms that the ultimate burden of proof remains, as always, with the plaintiff in such a circumstance. See ____ U.S. at ____, 113 S.Ct. at 2747. The plaintiff must still present sufficient evidence to create controversy regarding the credibility of the defendant's justification. See MacDonald, 941 F.2d at

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[8] This makes sense in light of the McDonnell-Douglas / Burdine system of shifting burdens. If the plaintiff first makes his prima facie case and the defendant then offers a nondiscriminatory justification, we return to square one with all burdens back on the plaintiff. If, however, a factfinder arrives at this third level and decides, based upon the evidence, not to believe what the defendant purports to be the reason for its actions, it makes sense that we treat the defendant's proffer as if it never existed and allow the factfinder to rule in favor of the plaintiff based solely on the prima facie case. However, it is at the gateway between the second and third levels of this balancing act where the plaintiff is required to provide some type of evidence of pretext in order to require the factfinder to evaluate the defendant's rationale.

1121-22 ("The court 'must still make a judgment as to whether the evidence, interpreted favorably to the plaintiff, could persuade a reasonable jury that the employer had discriminated against the plaintiff.'") (quoting Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989)). See also Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993) (decided after Hicks).

At the summary judgment stage, a plaintiff who does not produce specific evidence to create an issue of material fact is not allowed to avoid summary judgment and go forward to trial. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Fed. R. Civ. P.56(e). This is particularly so in circumstances where plaintiff bears the ultimate burden of proving their case. The California court's position would permit a plaintiff to ignore this burden or production and

proceed to trial when he has offered no evidence that could possibly controvert the defendant's justification. Cf. LeBlanc v. Great American Insurance Company, No. 93-1050, 1993 WL 380163, at *7 (1st Cir. Sept. 29, 1993) ("In the context of the summary judgment proceeding, Hicks requires that, once the employer has advanced a legitimate nondiscriminatory basis for its adverse employment decision, the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age.")(citations omitted). Such a standard as the court adopts in Moisi would be much lower than the one used for civil plaintiffs in other areas of the law and would be unsupported by case law from either the Supreme Court or the federal

courts of appeal.

Moreover, the particular need to test credibility which appears to motivate the Moisi court is less important when the justification offered by the defendant is supported by pre-existing evidence (i.e., a long established, well-documented policy), as it is in Bolton's case. Perhaps, for example, in a case where the subjective evaluation of a supervisor provides the basis for the defendant's defense, credibility might be relevant to the evaluation of pretext. However, even in such a circumstance, it would still be incumbent upon the plaintiff to provide the court with at least some basis, some rationale why it should allow this excursion into the witness' (and, ultimately, the defendant's) credibility. Given the context of Title VII and ADEA, that rationale must be relevant to the plaintiff's burden of producing evidence

from which a jury could infer discriminatory intent. Without such a limitation, every plaintiff in an ADEA or Title VII case would be entitled to a trip to the factfinder even if he or she had no specific evidence of discrimination to support the claim. Hicks was not meant to render such a result.

In the end, nothing in Hicks could possible be read as disfavoring use of the summary judgment procedure, especially since the case reaffirmed that the plaintiff bears the ultimate burden of persuasion in employment discrimination cases. Rather, the Supreme Court's language was only intended to guide lower courts in balancing the burdens of proof and persuasion that are part and parcel of every employment discrimination case since McDonnell-Douglas was decided over 20 years ago. Hicks does nothing to alter the requirement that the plaintiff must

provide evidence to support an actual finding of discrimination. See ____ U.S. at ____, 113 S.Ct. at 2749, n.4.

In the case at hand, the only direct evidence which Bolton introduces on the question of pretext is testimony regarding comments made by his immediate supervisor, David Goodpasture. Plaintiff testified that Goodpasture made numerous derogatory remarks regarding his ages and his lack of speed. Several of Bolton's co-workers testified in depositions that they had heard Goodpasture make such comments. It is unclear from this testimony exactly what the purpose was of Goodpasture's remarks.[9] Moreover, Scrivner presents

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[9] Indeed, several of the co-workers testified that Goodpasture might have been trying to encourage Bolton to meet production standards. Bolton filed two grievances with his union local against Goodpasture for remarks Goodpasture made. See Plaintiff's Exhibit 15. These complaints were dated March 28, 1991 and July 25, 1991. In neither document did

evidence that, although he was Bolton's immediate supervisor, Goodpasture played no role in the decision not to allow plaintiff to return to his job or in any decision involving the continued employment of other older or injured workers. Bolton offers no evidence to contradict this.

Ultimately, plaintiff's proffer is insufficient to meet his burden. As one court has observed, "An age discrimination plaintiff must demonstrate that a nexus exists between allegedly discriminatory statements and the unfavorable employment decision at issue." O'Connor v. Consolidated Coin Caterers Corporation,

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Bolton stated only that he believed that Goodpasture was "harassing and discriminating against me." In his July 1991 complaint, Bolton detailed how Goodpasture would not let him work after he was injured because Bolton's release form restricted him to light duty. Neither complaint contains sufficient information to infer anything meaningful about Goodpasture's intent.

829 F.Supp. 155 (W.D.N.C. 1993) (citing E.E.O.C. v. Clay Printing Co., 955 F.2d 936, 942 (4th Cir. 1992). Cf. Tennaro v. Ryder System, Inc., No. 91-40003-GN, 1993 WL 370565 (D. Mass. Sept. 10, 1993) (denying summary judgment when remarks about plaintiff's age were made by supervisor who fired him). Plaintiff fails to establish such a connection regarding Goodpasture's remarks. Moreover, Bolton fails to introduce any other direct evidence from which a reasonable jury could find pretext.[10] Nor

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[10] Plaintiff presents several internal memos from management at Scrivner in order to suggest that the company's policy either intended to or had the effect of discriminating against older (and disabled) workers. See Plaintiff's Exhibits 7-9. This evidence does more to hurt than help plaintiff's cause. Plaintiff's Exhibit 7, a memo from Don Tenbrunsel to All Supervisors, dated January 10, 1991, states in part, "On-the-job injury - No employee may return to work without an approved return to work slip from Presbyterian." Plaintiff's Exhibit 8, a memo from Jim Davis to All

has plaintiff presented any circumstantial evidence from which the Court could infer discriminatory motive on the party of Scrivner.[11] See Lucas, 857 F.2d at 1400

Warehouse supervisors, dated July 26, 1991, states in part, "If an injury results in work time lost by the employee, he must have a full written release form the company's physician before he can return to work - no exceptions. A release with any restrictions, light duty, no walking, no lifting, etc., is not acceptable." Plaintiff's Exhibit 9, a memo from Don Tenbrunsel to All Supervisors, dated December 23, 1991, reiterates much of the content of the previous two memos. None of these documents indicate that the company intended to discriminate against older or disabled workers. Each document is clear that the "no return" policy applies to all workers, regardless of age or any other factor. A factfinder could not reasonably infer from these memos that Scrivner's policy was intended to discriminate against older workers, either directly or indirectly.

[11] Plaintiff suggests that the Court should infer disparate treatment from the fact that Scrivner stood to benefit financially by hiring casual workers to replace regular workers who were either older or injured. Absent some evidence that such concerns mattered to Scrivner when it decided to institute its injured workers policy or when it decided to prevent Bolton from returning, a reasonable jury

("A party may attempt to 'meet his burden directly, by presenting direct or circumstantial evidence that age was a determining factor in his discharge.'") (quoting La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409 (7th Cir. 1984)). In the end, plaintiff fails to introduce any evidence giving rise to genuine issues of material fact showing that Scrivner's justification was pretextual. See Martin, 3 F.3d at 1417; MacDonald, 941 F.2d at 1121-22; Merrick, 911 F.2d at 430. Because Bolton cannot meet the required burden, his ADEA claim cannot survive summary judgment.

CONCLUSION

Scrivner's Motion for Summary Judgment is GRANTED with respect to Bolton's federal claims under the ADA and ADEA.

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could not infer that cost savings alone indicate an intent to discriminate on the basis of age. See Sperry Corp., 852 F.2d at 511-12.

The Court declines to entertain jurisdiction over plaintiff's state law claims, pursuant to 28 U.S.C. §1367(c), to include a complaint of retaliatory discharge, and they are DISMISSED WITHOUT PREJUDICE. The Court expresses no opinion regarding the merit of other contentions raised in defendant's brief concerning plaintiff's state law causes of action.

It is so ordered this ____ day of November, 1993.

WAYNE E. ALLEY
United States District Judge

Entered in Judgment Docket on 11-9-93

APPENDIX "C"

29 U.S.C. § 623 Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for any employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual's age;

(2) to limit, segregate,or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

42 U.S.C. §12101

Findings and Purpose

(b) Purpose

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to

address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12102 Definitions

(2) Disability

The term "disability" means, with respect to an individual-

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12111 Definitions

As used in this subchapter:

(8) Qualified individual with a disability

The term "qualified individual with disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions or the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what function of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include-

(A) making existing facilities used

by employees readily accessible to and usable by individual with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified reader or interpreter, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12112 Discrimination

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

29 C.F.R. § 1630.2 Definitions

(g) Disability means, with respect to an individual--

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record or such an impairment;or

(3) being regarded as having such an impairment.

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological

disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits-(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working-

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute

a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working";

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar

training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

* * *

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual hold or desires and who, with or without reasonable accommodation, can perform the essential function of such position. (See §1630.3 for exceptions to this definition).

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working-

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute

29 C.F.R. §1630.2(g) APPENDIX

Disability

In addition to the term "covered entity" there are several other terms that are unique to the ADA. The first of these is the term "disability." Congress adopted the definition of this term from the Rehabilitation Act definition of the term "individual with handicaps." By so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term "disability" as used in the ADA. Senate Report at 21; House Labor Report at 50; House Judiciary Report at 27.

The definition of the term "disability" is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes of this part. An individual is considred to have a "disability" if that individual

either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or, (3) is regarded by the covered entity as having such an impairment. To understand the meaning of the term "disability," it is necessary to understand, as a preliminary matter, what is meant by the terms "physical or mental impairment," "major life activity," and "substantially limits." Each of these terms is discussed below.

29 C.F.R. §1630.2(h) APPENDIX

Physical or Mental Impairment

This term adopts the definition of the term "physical or mental impairment" found in the regulations implementing section 504 of the Rehabilitation Act at 34 C.F.R., part 104. It defines physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder.

The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23, House Labor Report at 52, House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were

completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable throught the use of a hearing aid.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predispositions to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the definition

does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantage such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See Senate Report at 22-23; House Labor Report at 51-52; House Judiciary Report at 28-29.

29 C.F.R. §1630.2(i) APPENDIX

Major Life Activities

This term adopts the definition of the term "major life activities" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching. See Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

29 C.F.R. §1630.2(j) APPENDIX

Substantially Limits

* * *

. . . The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) The geographical area to which the individual has reasonable access;

(2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) The job from which the individual

has been disqualififed because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqalified because of impairment (broad range of jobs in various classes).

* * * *

. . . [A]n individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restrcted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs.

* * * *

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disaiblity. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition.

29 C.F.R. §1630.2(k) APPENDIX

Record of a Substantially Limiting Condition

The second part of the definition provides that an individual with a record of an impairment that substantially limits a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as learning disabled are protected from discrimination on the basis of that erroneous classification. Senate Report at 23; House Labor Report at 52-53; House

Judiciary Report at 29.

This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impariment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.

* * *

FILED
JAN 30 1995

No. 94-1103

IN THE UNITED STATES SUPREME COURT

October Term 1994

Floyd Bolton, Petitioner

v.

Scrivner, Inc., an Oklahoma corporation, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RULE 29.1 STATEMENT

Respondent, Scrivner, Inc., was at all relevant times an Oklahoma corporation; its parent corporation was Franz Haniel & Cie, G.m.b.H., a German corporate entity. Respondent recently has been purchased by Fleming Companies, Inc., a publicly traded Oklahoma corporation with no parent corporation, but with the following partially-owned subsidiaries: Big W of Florida, Inc.; Dairy Fresh of Louisiana, Inc.; South Ogden Super Duper, Inc.; and, University Foods, Inc.

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STATEMENT OF THE CASE

Bolton[1] was an employee of Scrivner, a wholesale grocery supplier, at all relevant times. Bolton was employed as an "order selector" at Scrivner's Oklahoma City warehouse. The job is physically demanding, and requires repetitive lifting and handling of items weighing 50 pounds or more. Bolton was a member of Teamsters Local Union No. 886, and his employment was subject to the terms of a collective bargaining agreement between Scrivner and the Teamsters.

Bolton sustained a work-related injury in 1991, and went on medical leave of absence beginning October 19, 1991, under the terms of the collective bargaining agreement. A Scrivner-selected

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[1] Petitioner, Floyd Bolton, will be referred to in this brief as "Bolton"; Respondent, Scrivner, Inc., will be referred to in this brief as "Scrivner."

doctor opined that Bolton was physically unable to return to his order selector job in July 1992. In May 1992, Bolton's doctor also had determined that Bolton was physically unable to return to his order selector job. Bolton never provided Scrivner with a contrary medical opinion, or with a medical release authorizing his return to his order selector job. Consequently, Scrivner did not allow Bolton to return to his order selector job.

Bolton filed suit in the United States District Court for the Western District of Oklahoma on March 2, 1993, alleging violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621 et seq., and the Americans With Disabilities Act ("ADA"), 42 U.S.C.

§§12101 et seq., under disparate treatment theory.[2]

Scrivner moved for summary judgment on Bolton's federal law claims on the basis that Bolton failed to establish a *prima facie* case of either intentional age or disability discrimination. Scrivner asserted that Bolton could not succeed on his disability discrimination claim under disparate treatment theory because he could not show that he was a "disabled person" under the ADA or that he requested job accommodation and, thus, could not establish that he was an "otherwise qualified" disabled person under the ADA. Scrivner also asserted that Bolton had no evidence of unlawful intent.

---

[2] Bolton also asserted supplemental state law claims. The District Court declined to exercise jurisdiction over Bolton's supplemental claims and dismissed them without prejudice after granting summary judgment against Bolton on his federal law claims. Bolton's state law claims are not at issue in this appeal.

Scrivner asserted that Bolton could not succeed on his age discrimination claim under disparate treatment theory because he could not show that he was adequately performing his assigned job duties at the time of his alleged termination; that he was permanently replaced by a younger person; or, that Scrivner acted with unlawful intent.[3]

In responding to Scrivner's motion for summary judgment, Bolton based his claim of disabled status under the ADA solely on an alleged substantial limitation of the major life activity of working, but he failed to produce evidence that his physical impairment prevented him from performing a class of jobs or a broad range of jobs in various classes. Bolton

---

[3] Scrivner also denied that Bolton was terminated; instead, although Bolton was not allowed to return to work, he remained employed under a medical leave of absence policy pursuant to the terms of the collective bargaining agreement.

did not allege a substantial limitation of any other major life activity.

For his age discrimination claim, Bolton alleged as circumstantial evidence of unlawful intent that Scrivner reaped economic benefit by ridding itself of older, "costlier" employees; and alleged as direct evidence of unlawful intent that a member of Scrivner management who was not involved in the challenged decision-making process made age-related comments to him prior to his leave of absence.

It is essential to an understanding of this litigation to realize that Bolton's age and disability discrimination claims were inseparably joined, as Bolton alleged essentially the same set of facts in support of both claims.

The District Court granted Scrivner's motion for summary judgment on Bolton's claims for intentional age and disability

discrimination, concluding: 1) that Bolton failed to produce any evidence that his alleged physical impairment substantially limited one or more of his major life activities, including his ability to work; and, 2) that Bolton failed to produce any evidence of unlawful age discrimination. *Bolton v. Scrivner, Inc.*, 836 F.Supp. 783 (W.D. Okl. 1993).

The United States Court of Appeals for the Tenth Circuit affirmed the District Court, ruling that Bolton failed to establish that he was substantially limited in the major life activity of working and, thus, he failed to establish that he was a disabled person under the ADA; and, that Bolton failed to produce evidence of unlawful age discrimination because there was no nexus between the alleged discriminatory comments and the challenged employment decision, nor was

pretext shown by potential cost savings inherent in replacing Bolton with younger, casual labor. *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994).

SUMMARY OF ARGUMENT

As set forth in Supreme Court Rule 10.1, "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Bolton raises no constitutional issue, no claim of conflict among the circuits, and no issue of significance beyond the facts of this case. Bolton also fails to identify an important question of federal law which should be settled by this Court.

In its motion for summary judgment, Scrivner alleged specific facts, which, if true, entitled it to judgment against Bolton as a matter of law. Bolton has never controverted any of the material

facts Scrivner set forth in support of its dispositive motion.

Bolton asserted that he was a disabled person under the ADA solely on the basis of an alleged substantial limitation of the major life activity of working. Bolton, however, failed to produce any evidence that his alleged physical impairment substantially limited him in any major life activity -- including the major life activity of working. Instead, Bolton only produced evidence that his alleged impairment impacted his ability to perform a single job, to-wit: the order selector job he held before his October 1991 injury.

Under his intentional age discrimination claim, Bolton failed to offer either direct or circumstantial evidence from which the District Court could infer discriminatory motive. Of

particular import, under his ADA claim plaintiff acknowledged that his alleged physical impairment played a significant role in Scrivner's challenged employment decision, thus undermining any inference of age discrimination. Further, the direct evidence of unlawful intent which plaintiff advanced consisted of alleged remarks by an individual not involved in the decision-making process, i.e., plaintiff failed to establish a nexus between the alleged comments and the challenged employment decision. Consequently, plaintiff's age discrimination claim failed at the pretext stage.

The conclusions and inferences drawn by the District Court from the undisputed material facts were the only logical and reasonable ones which could have been drawn from the evidence presented to it by

the parties. Accordingly, reliance upon those undisputed material facts in granting Scrivner's motion for summary judgment was entirely proper. Likewise, the Court of Appeal's reliance on those same undisputed material facts in affirming the District Court was entirely proper. In sum, Bolton has failed to identify any genuine issues of fact which would preclude a judgment for Scrivner.

ARGUMENT AND AUTHORITY

PROPOSITION I.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT BOLTON WAS NOT A "DISABLED PERSON" UNDER THE ADA'S DEFINITIONAL REQUIREMENTS

In reviewing a grant of summary judgment, the standard of review is *de novo* and the record is viewed in the light most favorable to the party opposing summary judgment. *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 941 (10th Cir. 1994);

Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 527-28 (10th Cir. 1994). An appellate court may affirm summary judgment "on grounds other than those relied on by the district court when the record contains an adequate and independent basis for that result." *Bolton*, 36 F.3d at 942 (*quoting Cone*, 14 F.3d at 528).

In this case, Bolton does not challenge any of the material facts established by Scrivner, but merely challenges the conclusions drawn from those facts by the lower courts.

Bolton argues on appeal that the lower courts improperly determined that he was not disabled under the ADA because he produced some evidence of a physical impairment to his feet. Bolton asserts that he produced evidence establishing that he was a disabled person under all

three definitional prongs of the ADA, wherein an individual may establish disabled status by producing evidence of actual impairment that substantially limits a major life activity, a record of such an impairment or being regarded as having such an impairment. 42 U.S.C. §12102(2). Bolton, however, failed to raise the issues of whether he qualifies as a disabled person under the ADA based on a perceived impairment or a record of impairment before the Court of Appeals and, thus, neither is at issue here. *Bolton*, 36 F.3d at 942, 944 n. 4.

As to his claim that he had an impairment which substantially limited his ability to work, Bolton simply failed to produce evidence sufficient to support such a finding. Pursuant to 29 C.F.R. §1630.2(j)(2), one of the Equal Employment Opportunity Commission's implementing

regulations for Title I (Employment) of the ADA, three factors "should be considered" when determining whether an alleged impairment substantially limits *any* major life activity: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment."

With respect to the major life activity of *working*:

> (i) the term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. §1630.2(j)(3)(i).

Three additional factors "may be considered" when determining whether an impairment substantially limits the major life activity of working:

> (A) [t]he geographical area to which the individual has reasonable access;
>
> (B) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. §1630.2(j)(3)(ii).

The Court of Appeals for the Tenth Circuit previously has recognized the relevance of these latter factors in

determining substantial limitation of employment potential under the Rehabilitation Act of 1973. *See Welsh v. City of Tulsa, Oklahoma*, 977 F.2d 1415, 1419 (10th Cir. 1992).

The lower courts correctly held that the ADA defines "disability" in substantially the same terms as the Rehabilitation Act defines "handicap" (now "disability"), and that relevant case law developed under the Rehabilitation Act is generally applicable in construing the term "disability" as used in the ADA. *Bolton*, 36 F.3d at 942-43; *Bolton*, 836 F.Supp. at 787; *see also* 29 C.F.R. Part 1630 - Appendix (Interpretive Guidance to Title I of the ADA), §1630.2(g). Accordingly, the lower courts properly relied on the analysis developed under the Rehabilitation Act in determining

substantial limitation of the ability to work under the ADA.

The additional factors listed at 29 C.F.R. §1630.2(j)(3)(ii) are misconstrued by Bolton. A proper reading of the ADA and its implementing regulations shows that when a claim of disabled status is predicated on an alleged substantial limitation of the ability to work, factors additional to those set forth in 29 C.F.R. §1630.2(j)(2) *should* be considered in making a particularized determination of disabled status, and that those additional factors set forth at 29 C.F.R. §1630.2(j)(3)(ii) are simply illustrative of the additional factors that should be considered. *See* 29 C.F.R. Part 1630, Appendix (Interpretive Guidance on Title I of the Americans With Disabilities Act), §1630.2(j) (Substantially Limits).

In sum, the lower courts found that the record was devoid of evidence supporting any of the three additional factors relevant in determining substantial limitation of the ability to work. *Bolton*, 36 F.3d at 943-44; *Bolton*, 836 F.Supp. at 788. Bolton only asserted and produced evidence that he was unable to work at a single job, i.e., his former order selector position. Bolton wholly failed to produce evidence that his alleged impairment *substantially limited* his employment potential, as the term is defined in the ADA's implementing regulations. The District Court correctly held, and the Court of Appeals properly affirmed, that inability to perform a single, particular job is not evidence of substantial limitation of the major life activity of working. *Bolton*, 36 F.3d at 943-44; *Bolton*, 836 F.Supp. at 788.

Because Bolton failed to offer specific evidence showing a genuine dispute of material fact regarding his status as a disabled person under the ADA, an element on which he bore the burden of proof at the summary judgment stage and on which he would have borne the burden of proof at trial, Scrivner's motion for summary judgment on Bolton's ADA claim was properly granted and, subsequently, affirmed.

Bolton urges on appeal that the lower courts have "substituted their own judgment for what a disabled person is, rather than allowing the jury to determine the issue." Pet. for Cert. at 16. Bolton's argument, if accepted, would obviate the role of the courts in the pretrial phase of litigation and, indeed, would make summary disposition of any case effectively impossible. In the absence of

record evidence of substantial limitation, Bolton attempts to rely on "logic and human experience" to defeat Scrivner's motion for summary judgment. *Id.* at 21. Bolton should have offered proof, not conjecture, in resisting Scrivner's motion for summary judgment.

PROPOSITION II.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT BOLTON FAILED TO RAISE A GENUINE ISSUE OF FACT REGARDING PRETEXT UNDER HIS ADEA CLAIM

Bolton offered both purported circumstantial and direct evidence of unlawful age discrimination. As circumstantial evidence, Bolton alleged, albeit without supporting evidence, that Scrivner *may* have saved money by replacing him with a less expensive casual laborer. The District Court assumed for the purposes of Scrivner's motion for summary judgment that, although Bolton offered no

evidence of the identity or age of the casual laborer who purportedly replaced him, Bolton's claim was sufficient to establish a *prima facie* case. *Bolton*, 836 F.Supp. at 790.

The District Court nevertheless held that the circumstantial evidence of unlawful intent was inadequate at the pretext stage of Bolton's case because Bolton's *ADA claim* was premised on the allegation that Scrivner refused to allow him to return to work because of his *physical impairment*. *Id.* As the District Court held: "In so arguing, plaintiff acknowledged that his physical limitations played a significant role in Scrivner's decisionmaking." *Id.* (*relying on St. Mary's Honor Society v. Hicks*, --- U. S. ---, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). The District Court concluded

that Bolton failed to carry his ultimate burden of proving that Scrivner's asserted nondiscriminatory reason for the challenged employment decision, i.e., Bolton's physical inability to perform his assigned job duties, was a pretext for age discrimination. *Id.* at 790-92.

Bolton also offered purported direct evidence of unlawful intent in the form of remarks allegedly made by a supervisor not involved in the challenged decision-making process. The District Court correctly held that Bolton failed to establish any nexus between the alleged comments and the challenged employment decision. *Id.* at 792-93. Bolton offered no evidence to contradict Scrivner's assertion that the supervisor who allegedly made age-related remarks was not involved in the decision-making process.

Contrary to his assertions herein, Bolton had his opportunity to produce evidence of pretext to the District Court, but he failed to do so. The District Court correctly held that under *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), and *Hicks, supra*, that Bolton failed to produce evidence sufficient to persuade a jury that Scrivner's asserted nondiscriminatory reason for the challenged employment decision, i.e., his physical inability to perform his job, was merely a pretext for age discrimination. *Bolton*, 836 F.Supp. at 790.

The District Court did not make improper credibility assessments in determining that Bolton's ADEA claim failed at the pretext stage. Rather, the District Court correctly relied on the

internally contradictory nature of Bolton's age and disability discrimination claims in assessing his evidence. As the District Court noted:

> Essentially the same set of facts are used by Bolton to prove both claims. This overlap of facts puts plaintiff in a dissonant posture, . . . because for success on his first claim he must be disabled and on his second claim, he must be able. These facts, and Scrivner's challenges to Bolton's legal conclusions, are the basis for this Court's analysis with respect to each statute.

Id. at 786-87.

Because of his ADA claim, Bolton was required to contend that a physical impairment played a significant role in the challenged employment decision. In so doing, Bolton fatally undermined his purported evidence of unlawful age discrimination. The Court of Appeals properly affirmed on the same basis. *Bolton*, 36 F.3d at 944-45.

Bolton tries to create the appearance of error where none exists by arguing that summary judgment generally is inappropriate at the pretext stage of an employment discrimination case because it necessarily entails "credibility" determinations within the province of the jury. In support, Bolton cites *Moisi v. College of the Sequoias Community College Dist.*, 25 Cal.Rptr.2d 165 (Cal.App. 1993) (*construing Hicks*).

The District Court properly rejected Bolton's argument and the reasoning of *Moisi* in pointing out that the California appellate court "misreads *Hicks* in light of well-established law regarding both employment discrimination and summary judgment procedures." *Bolton*, 836 F.Supp. at 791. The District Court properly interpreted *Hicks* to reaffirm precedent

holding that the ultimate burden of proving intentional prohibited discrimination always remains with the plaintiff, and that in order to avoid summary judgment the plaintiff must present sufficient evidence to create controversy regarding the defendant's asserted facially nondiscriminatory reason for the challenged action. *Id.* As the District Court held: "At the summary judgment stage, a plaintiff who does not produce specific evidence to create an issue of material fact is not allowed to avoid summary judgment and go forward to trial." *Id.* (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986) and Rule 56(e), Fed.R.Civ.P.).

The District Court properly criticized the central holding of *Moisi* for not requiring a plaintiff to produce

evidence creating an issue of material fact regarding the defendant's asserted facially nondiscriminatory reason. Under *Moisi*, plaintiff would be able "to ignore this burden of production and proceed to trial when he has offered no evidence that could possibly controvert defendant's justification." *Id.*

Hicks, properly construed, holds that once the defendant advances a facially nondiscriminatory reason for the challenged employment decision, the plaintiff must produce specific evidence sufficient for the factfinder reasonably to conclude that the challenged decision was improperly motivated by prohibited intent. Otherwise, the plaintiff is not entitled to take his case before the trier of fact. *See id.*

The District Court's application of summary judgment procedure is consistent with *Hicks* and other holdings of this Court. In contrast, the practical effect of Bolton's argument would be that any presumption arising in a plaintiff's favor after establishing a *prima facie* case would effectively preclude summary disposition, even if the defendant asserted a facially nondiscriminatory reason for the challenged decision. In sum, the establishment of a *prima facie* case would, *ipso facto*, preclude summary judgment and make a trip to the jury a virtual certainty; applicable law does not countenance such an absurd result. Accordingly, Bolton's argument was

properly rejected by the District Court, and should be rejected herein, also.[4]

CONCLUSION

For all of the reasons and arguments set forth above, Respondent, Scrivner, Inc., urges the Court to deny *certiorari* in this case.

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[4] The Court of Appeals did not expressly address *Moisi* in affirming the District Court, although implicit in its analysis is that the District Court properly rejected the holding of *Moisi*. *Bolton*, 36 F.3d at 944-45.

CERTIFICATE OF SERVICE

I hereby certify that I am counsel of record for the Respondent and that on the 20th day of January, 1995, three (3) correct copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were hand-delivered to the following-named counsel:

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Supreme Court
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(3)

Case No. 94-1103

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

FLOYD BOLTON, Petitioner

vs.

SCRIVNER, INC., Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Case No. 94-1103

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

FLOYD BOLTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Tenth Circuit
	)	Docket No. 93-6402
SCRIVNER, INC.,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of February, 1995, three (3) true and correct copies of PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was deposited in the United State mail, postage prepaid, to James C. Chandler, Peter Van Dyke, and Sam Reynolds Fulkerson, Lytle Soule & Curlee, 1200 Robinson Renaissance, 119 N. Robinson, Oklahoma City, OK 73102.

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Case No. 94-1103

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

FLOYD BOLTON, Petitioner

vs.

SCRIVNER, INC., Respondent

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COMES NOW, the Petitioner, Floyd Bolton, and respectfully requests that the Court consider the arguments set forth in his Reply to the Respondent's Brief in Opposition to Petition for Writ of Certiorari.

I. PETITIONER RAISES AN IMPORTANT FEDERAL QUESTION

Petitioner questions the veracity of Respondent's claim on page seven of its Brief in Opposition that Bolton fails to identify an important issue of federal law

which should be settled by this Court. The Americans With Disabilities Act, 42 U.S.C. §12101 et seq., (ADA), is an extremely important new piece of federal legislation with far-reaching ramifications in both business and government, as well as in the private lives of individuals. To say that this is not an important issue of federal law is ludicrous.

Further, this Court has not, as yet, proscribed limits for the ADA. Only the Courts of Appeals have considered the many facets of, and issues raised by, this intricate piece of legislation. Although there are numerous guidelines set forth in the Code of Federal Regulations regarding how the ADA should be interpreted, this Court has yet to determine the parameters of those regulations.

There are three important issues

within the ADA which should be addressed by this Court.[1] (1) What is the definition of a "handicapped person" under the ADA? (2) What are the mandatory requirements for showing that a handicapped person is substantially limited in a major life activity? (3) What are the mandatory requirements for a factual and legal showing that a handicapped person is substantially limited in the major life activity of working?

The answers to these questions will have a major effect on the rights of handicapped persons in the workplace. One of the major concerns of Congress in enacting the ADA was its hope that this

---

[1]These important issues need to be addressed by this Court, both at the summary judgment stage and at trial, in regards to burden of proof and sufficiency of the evidence.

legislation would greatly reduce discrimination against working handicapped persons. (See Statement of Purpose, 42 U.S.C. §12101., Petition for Certiorari at 2C). If the Tenth Circuit's interpretation of these crucial issues is allowed to stand, then the ADA is no more than a re-hash of the Rehabilitation Act, (29 U.S.C. §701 et seq.), and will have no greater impact in the workplace than that legislation has. This is apparent based on the Tenth Circuit's reliance on Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992).

How these questions are finally interpreted by this Court will create a "handbook" for the future of America's workplace. This case is an extremely important one deserving of this Court's review.

II. THE CODE OF FEDERAL REGULATIONS CONTAINS RECOMMENDATIONS FOR INTERPRETATION OF THE ADA

Respondent has attempted to divert the Court's attention away from the plain language of the regulation found at 29 C.F.R. §1630.2 (j)(3)(ii) on page 16 of its Brief in Opposition. The three factors are ones which may be considered in determining whether a handicapped individual is substantially limited in the major life activity of working, and are clearly not mandatory.

In fact, Respondent supports the permissive nature of the factors by describing them as "illustrative." (See page 16 of Brief in Opposition.) If, as Scrivner claims, Congress intended these factors only to be "illustrative," then how could they alone have doomed Bolton's claim that he was a handicapped individual under the ADA?

In a recent Tenth Circuit decision, the court took a position against the mandatory nature of certain EEOC recommendations for implementing the ADA. In White v. York International, ___ F.3d ___, 1995 WL 3735 (10th Cir.(Okl.)), Appellant White contended that his employer, York, had failed to accommodate his disability as set forth at 29 C.F.R. §1630, Appx. §1630.9. Specifically, White claimed that York had failed to initiate an informal interactive process with him to ascertain reasonable accommodations, and that such failure operated as a per se preclusion to summary judgment. Id. at 5. The court declined to accept White's reasoning, by stating "White has misconstrued an EEOC recommendation as a statutory requirement." Id. at 5 (Emphasis ours). Clearly, the Tenth Circuit felt the provision White was

relying on was not a mandatory provision.

Yet, in Bolton, the Tenth Circuit held just the opposite. It stated that Bolton had not proved that he was substantially limited in the major life activity of working because he failed to offer evidence on his "vocational training, the geographical area to which he has access, or the number and type of jobs demanding similar training from which Bolton would also be disqualified." Pet. for Cert. at 16A.[2] Those are the very criteria at 29 C.F.R. §1630.2(j)(3)(ii) which Petitioner claims are permissive and Respondent claims are "illustrative."

The Tenth Circuit cannot have it both

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[2] Even if it is determined by this Court that these criteria are mandatory, Bolton claims that the Court of Appeals erred in determining that he did not meet them. The only one of the three that Bolton did not have testimony supporting was the "geographical area" factor. See pages 20-22 of Petition for Certiorari.

ways. The word "may" plainly appears in the text of the regulation. (See Pet. for Cert. at 20C.) Following traditional statutory construction, guidelines which use "shall" or "should" ought to be considered as mandatory, and those which use "may" ought to be considered as permissive. Petitioner feels the Court of Appeals plainly erred in ruling that Bolton's claim failed because he could not show all the factors listed in §1630.2(j)(3)(ii).

Finally, the determination of whether an individual is substantially limited in a major life activity must be a factual determination made on a case-by-case basis. Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993); Elstner v. Southwestern Bell Telephone Co. 659 F.Supp. 1324 (S.D. Tex. 1987), aff'd at 863 F.2d 881 (5th Cir. 1988). The

district court, as well as the Tenth Circuit Court of Appeals, in the instant case, have substituted the jury function in performing the factual determination of whether Bolton was substantially limited in a major life activity. The court's actions are contrary to existing law.

III. LOGIC AND EXPERIENCE SHED LIGHT ON BOLTON'S CLAIMS

On page 19 of its Brief in Opposition, Respondent chides Bolton for using "logic and human experience" as measurements for determining if Bolton's handicap prevented him from doing a "class of jobs" or a "broad range of jobs in various classes" as required by the ADA. Surely, it would not be necessary for Bolton to call witnesses such as waitresses or stock boys, whose jobs require prolonged standing, walking, and

lifting, (as did Bolton's job of order selector) to come to court and testify that their jobs require such activities. If logic and human experience are out of place in the federal courts of this country, then we have certainly strayed from our legal roots.

IV. BOLTON IS NOT REQUIRED TO GIVE DIRECT EVIDENCE OF DISCRIMINATORY INTENT

On page 23 of its Brief in Opposition, Respondent argues that Bolton's claim of disability discrimination under the ADA and age discrimination under the ADEA, 29 U.S.C. §623, are "internally contradictory." It fails to point out that the district court resolved this contradiction later in its opinion by stating that Bolton's ADEA argument was, essentially, that Scrivner was using Bolton's disability as a pretext

for age discrimination. See Pet. for Cert. at 28B.

Bolton is not required to present direct evidence of discriminatory intent. Krause v. Dresser Industries, Inc., 910 F2d 674, 677 (10th Cir. 1990). He is only required to show that the employer's proffered explanation is unworthy of credence. Remarks have been held by the Tenth Circuit to be probative of pretext, even if made in jest. Spulak v. K-Mart Corp., 894 F.2d 1150, 1155 (10th Cir. 1990).

In his case, Bolton submitted evidence that he was called "old fart" and that his employer made statements that he was too old to perform the work in question. The evidence also established that the employees who had been terminated were older employees with disabilities, establishing statistical evidence of

discrimination that was not rebutted by Scrivner. Fallis v. Kerr-McGee Corp., 944 F.2d 743 (10th Cir. 1991).

Scrivner's explanation as to why Bolton was terminated, i.e. that he was physically unable to perform the job, violates the ADA and was used by Scrivner as a pretext. If Scrivner had not violated the ADA, then it would not have had a reason to terminate Bolton other than his age.

Further, it is not unusual for plaintiffs to assert differing theories as separate cause of actions, which rely on the same or similar facts. Cases rarely fall within one specific legal classification. Bolton's case contains mixed issues regarding disability and age. Under the facts of his case, it was proper for him to assert both claims since Scrivner terminated him due to his

disability and his age.[3]

V. THE EFFECT OF THE HICKS CASE ON TITLE VII AND ADEA CASES AT THE SUMMARY JUDGMENT LEVEL NEEDS TO BE DETERMINED BY THIS COURT

Finally, Respondent's and the district court's interpretation of St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), (found at page 25-26 of its Brief in Opposition,) is simply that -- an interpretation. The district court in Bolton, in its Order denying an award of attorney fees to Scrivner, admits that the Hicks case will likely cause confusion in Title VII and ADEA cases. " ... the

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[3] Scrivner seems to argue in a global sense that although an employer may discriminate against a male because of his race and gender, the employee would be forced, as a matter of law, to choose which claim to pursue, since they may be contradictory in nature.

recent Supreme Court decision in Hicks may cause confusion for both courts and litigants in Title VII and ADEA cases, confusion that will only be dispelled by subsequent judicial interpretation." (The full Order is reproduced herein at Appendix A of this Reply.)

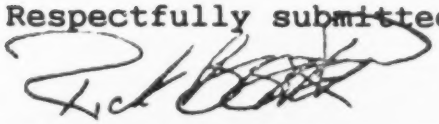
Respondent's claim that the district court was "correct" does nothing to dispel the confusion surrounding the role of summary judgment in employment discrimination cases. Only this Court's interpretation will have that effect.

CONCLUSION

Summary judgment can be inappropriate even when the basic facts are not disputed. Equally as important are the inferences drawn from the undisputed facts. Bolton's case presented issues which could and should only be resolved by a jury. The Court of Appeals decision

should be vacated, and the case remanded to the district court for trial on the merits.[4]

Respectfully submitted,



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[4] It is interesting to note that a similar case, Hicks v. Scrivner (cite) was recently tried before a jury in the Western District of Oklahoma. The jury found for the plaintiff on his ADA claim and awarded him over $200,000 in damages.

APPENDIX "A"

FILED
Dec 22 1993
Robert D. Dennis
By_____
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FLOYD BOLTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV 93-364-A
	)	
SCRIVNER, INC.,	)	
	)	
Defendant.	)	

O R D E R

Plaintiff Floyd Bolton brought the instant action alleging violations of the Americans With Disabilities Act (ADA) and the age Discrimination In Employment Act (ADEA), as well as several state law causes of action. Plaintiff claimed that defendant Scrivner, Inc. ("Scrivner") discriminated against him on the basis of

his age and his disability by refusing to allow him to return to his position with the company or to make appropriate accommodations for his physical restrictions. The Court granted defendant's motion for summary judgment because plaintiff failed to provide evidence that he was "disabled," as defined by the ADA, and that defendant's reason for preventing his return (his physical inability to perform the duties of this prior position) was a pretext for age discrimination under ADEA. The Court also dismissed plaintiff's state law claims without prejudice.

As the prevailing party, defendant now makes applications for attorney's fees to be taxed against plaintiff, as well as plaintiff's counsel, pursuant to Fed. R. Civ. P. 11. The Supreme Court has enunciated stringent standards that must

be met before a court may award attorney's fees to a prevailing defendant.

> In sum, a district court any in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was **frivolous, unreasonable, or without foundation,** even though not brought in subjective bad faith. In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been [a] victim . ., no matter how meritorious one's claim may appear at the outset, the course of litigation, is rarely predictable. Decisive facts may not emerge until discovery or trial. . . . Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978) (emphasis added). Under this elevated standard, the Court finds that defendants are not entitled to an award of attorney's fees.

Admittedly, plaintiff's case against Scrivener was thin. In his brief, plaintiff attempts to re-argue legal conclusions that have already failed in this Court. Such argument is best presented to the Court of Appeals. Nevertheless, the factual underpinnings of plaintiff's case were not so flimsy or frivolous as to warrant the award of fees to defendant. As the Court noted, while plaintiff did present evidence of his physical inability to perform the job of order selector, he failed to make the requisite showing that he was disabled as defined by the terms of the ADA and interpreted in relevant case law.

Plaintiff also presented evidence that met his burden of making out a prima facie case under ADEA. The crucial fault was plaintiff's failure to produce evidence of pretext sufficient to create an issue of material fact about defendant's justification and thereby proceed to trial. Nevertheless, it would seem harsh for the Court to tax fees against plaintiff since at least a prima facie case existed under the statute. Finally, while the Court observed that the contradictory nature of the claims compromised plaintiff's ability to prove this case under either federal statute, there is nothing inherently casuistical about such an approach.

Moreover, given the context of developing employment discrimination law, the Court is unwilling to penalize plaintiff for bringing a case where the

law is evolving. The ADA is a relatively new act and its boundaries will only be determined by litigation brought by a wide variety of plaintiffs, many of whom may not prevail on the merits of their case. Similarly, as the Court discussed at length in its order granting summary judgment, the recent Supreme Court decision in Hicks may cause confusion for both courts and litigants in Title VII and ADEA cases, confusion that will only be dispelled by subsequent judicial interpretation.

Defendant also argues that plaintiff's counsel violated his duty to conduct a reasonable inquiry into the facts of plaintiff's case, thereby warranting the taxing of fees under Rule 11. A signature on a pleading certifies to the Court that the party has conducted a reasonable inquiry into the law and

facts of a case and is satisfied that the pleading certifies to the Court that the party has conducted a reasonable inquiry into the law and facts of a case and is satisfied that the pleading is well-groomed. See Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 542 (1991). "If an attorney does not conduct the requisite 'reasonable inquiry,' sanctions are not only justified but must be imposed." Johnson v. McAdoo, 150 F.R.D. 684 (W.D. Okla. 1993). An objective standard is used in determining whether a reasonable and competent attorney would believe in the merits of an argument and sign their name to a filing or pleading. See Dodd Insurance Services, Inc. v. Royal Insurance Co. of America, 935 F.2d 1152,1155 (10th Cir. 1991). The attorney must present a colorable claim in order for it to be objectively reasonable

under the circumstances. Id. As can be inferred from the prior discussion, the Court does not believe that plaintiff's counsel was so derelict in his duty as to warrant sanctions under Rule 11.

Finally, defendant asks that this Court tax expert witness fees incurred in defending against plaintiff's ADA claim. Given the Court's findings with respect to attorney's fees, the Court is not inclined to do so. Moreover, it bears noting that, while 42 U.S.C. § 1988 specifically provides for the taxing of expert witness fees, the Tenth Circuit has held, in the context of ADEA, that such a cost shift is unavailable in the absence of express statutory authority from Congress. See Gray v. Phillips Petroleum Co.. 971 F.2d 591 (10th Cir. 1992). The provision in the ADA that addresses attorney's fees, 42 U.S.C. § 12205, makes no mention of taxing

expert witness costs. Thus, even had the Court ruled favorably on defendant's application with respect to attorney's fees, it appears that it would not be possible for the Court to do the same with respect to expert witness fees.

Defendant's Application for Attorney's Fees is DENIED.

It is so ordered this 22 day of December, 1993.

s/Wayne Alley
WAYNE E. ALLEY
United States District Judge